

of actual lines or equivalents and completely obscures the number of CLEC lines serving non-ISP customers in Texas. In addition, SWBT's figures are further inflated by the fact that its estimates are based on trunks ordered but not installed, even though on average only half of the trunks ordered from SWBT are likely to have been activated. See Beard & Mayo Decl. ¶¶ 34-36. More accurate measures of CLEC lines indicate that SWBT retains more than 99% of the residential lines in its territory and more than 90% of the business lines. Id. ¶ 41.

SWBT's local competition data contains a further material inaccuracy that results in a gross overestimation of the percentage of residential market share held by CLECs. As SWBT admits, its methodology extrapolates from CLEC E911 database listings, which only include lines from which outgoing calls can be made, to determine the overall percentage of business and residential lines in the market. See Habeeb Aff. ¶ 25. However, because outgoing calls cannot be made from certain types of business lines (e.g., call centers and ISP lines), these lines are not counted in the E911 database. Therefore, there is a lower percentage of business lines in the E911 database and, accordingly, a higher percentage of residential lines than is actually the case. Applying the E911 business and residential market share percentages to the overall number of lines thus overstates the share of the residential market captured by CLECs. Especially given the preponderance of ISPs among CLEC customers, SWBT's estimate that 244,000 facilities-based residential lines are served by CLECs is clearly too high. See Beard & Mayo Decl. ¶¶ 37-38; SWBT Br. att. 2.

Because access minutes terminated to CLECs reflect actual usage by business and residential customers, data on terminating access minutes provides a more accurate picture of the

state of local competition in Texas than SWBT's inflated estimates.^{32/} Recent data available to MCI WorldCom in its role as a long distance carrier indicates that in October 1999 all Texas CLECs as a group received less than three percent of the minutes terminated by MCI WorldCom in Texas. See Beard & Mayo Decl. ¶ 39. This percentage is significantly lower than SWBT suggests with its misleading numbers and significantly lower -- by more than 25 percent -- than the equivalent terminating minutes data for New York State as of June 1999, nearly half a year earlier. See Beard & Mayo NY Decl. ¶ 36.

The fundamental errors underlying SWBT's CLEC business and residential line estimates, in combination with the terminating access minute data, show that local competition -- outside the niche area of Internet service -- is still quite limited. As the Commission has noted, extensive local competition can provide a strong indication that an incumbent LEC has opened its market.^{33/} Where -- as in Texas -- competition is largely limited to one narrow market segment, the key question for the Commission is whether the BOC has committed "any sin of omission or commission" that would explain the dearth of competitive activity. See NY Order ¶ 427.

^{32/} In addition, terminating access traffic largely excludes Internet traffic, as most ISP customers dial a local number to reach their ISP.

^{33/} See MI Order ¶ 391 ("The most probative evidence that all entry strategies are available [to competitors] would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large)"); NY Order ¶ 427.

SWBT has committed several such “sins,” and its entry into long distance before the remaining barriers are eliminated would therefore be premature.

B. SWBT Has Not Yet Eliminated Several Significant Barriers to Entry or Irreversibly Opened the Local Market to Competition

That SWBT still has an overwhelming share of the local market four years after the passage of the Act is not due to hesitation by competitors. For years SWBT dragged its heels in implementing local competition at every opportunity, including challenging in court the constitutionality of section 271 and other provisions of the Act, as well as challenging the Commission’s efforts to implement the Act.^{34/}

In addition to the significant OSS, pricing and intellectual property barriers discussed above, SWBT’s negotiating positions with respect to DSL UNEs, although ultimately rejected as unreasonable in arbitration, were successful in slowing competition for advanced services. The history of SWBT’s conduct with respect to DSL-based services is described in detail in the arbitration award recently affirmed by the PUC.

There is also no basis to conclude that SWBT’s hostility to competition has abated, as demonstrated by its refusal to cooperate in the State’s plan to open 911 and E911 services to competition. SWBT has actively hindered its potential competitor and the government agencies attempting to encourage such competition and continues to do so. SCC was formally awarded a contract to be the exclusive database management provider of 911 and E911 services in some areas, and to compete in others. According to the state 911 agency (the Advisory Commission on

^{34/} The Commission has recognized that instances of discriminatory or other anticompetitive conduct by a BOC are relevant to the public interest analysis. See, e.g., MI Order ¶ 397.

State Emergency Communications or “ACSEC”), SWBT has steadfastly refused to permit SCC to interconnect with SWBT’s tandems in order to provide 911 and E911 service, which requires real-time data interjection for selective routing – denying the 911 agencies the economic and technical benefits of competition.^{35/} In light of SWBT’s consistent and continuing opposition to competition, it cannot be relied upon to eliminate the remaining barriers to competition after being granted 271 authority.

In addition to the OSS, pricing and other checklist issues discussed elsewhere in these comments, the most significant remaining barrier to an irreversibly open local market in Texas is SWBT’s grossly inadequate performance plan.

1. SWBT’s Performance Remedy Plan Is Inadequate to Prevent Backsliding.

A strong performance plan is important today and will become even more critical after SWBT takes the final steps necessary to complete the opening of its local markets to competition. Although there is some facilities-based competition in parts of Texas, that method of entry works primarily for large and medium-sized business customers in high-density geographic areas, and CLECs cannot rely exclusively on their own facilities to serve residential and small business

^{35/} See ACSEC Emergency Petition, Texas PUC Docket No. 202334, at 4-6 (filed Jan. 15, 1999) (Tab F hereto). ACSEC has also intervened in both wireless and wireline state tariff proceedings to challenge SWBT’s 911 tariffs because its rate structure, imposing rates for the various components of 911 service much higher than its bundled rate for complete 911 services, effectively precludes competition for database management, selective routing, and transport. See, e.g., ACSEC List of Issues, Texas PUC Docket No. 20856 (filed Aug. 25, 1999) (Tab G hereto); SCC List of Issues, Texas PUC Docket No. 20856 (filed Aug. 10, 1999) (Tab H hereto).

customers in most geographic areas.^{36/} That is why it is still true in Texas that “the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress’ objective of promoting competition in the local telecommunications market.” MI Order ¶ 332; see NY Order ¶ 81.

Until facilities-based competition has grown to the point where CLECs have other options for connecting to their customers if they encounter discrimination from SWBT, the Commission cannot rely solely on the market to protect against backsliding, and post-entry regulatory safeguards constitute a vital bulwark to protect the competitive gains that have been achieved in Texas. See Beard & Mayo Decl. ¶¶ 23-26. The Commission has recognized the importance of performance remedy plans with consequences sufficiently severe to deter backsliding by BOCs after they enter the long-distance market, without the need for lengthy regulatory proceedings. See NY Order ¶¶ 435-37, 441; MI Order ¶ 394. The performance plan that SWBT has proposed is inadequate to provide a sufficient deterrent to discriminatory conduct.

There are at least three critical components to an effective performance remedy plan: First, the plan must set standards that, when met, will ensure effective local competition. Second, the plan must require reliable and effective measurement and reporting of all competition-affecting functions to determine if the BOC has met the standards. Third, the plan must provide for remedies that are sufficiently severe and self-executing to give a BOC an incentive it does not otherwise have – to cooperate with competitors who seek to take away its market share. See Declaration of George S. Ford and John D. Jackson on Behalf of MCI WorldCom (“Ford and

^{36/} See Beard & Mayo Decl. ¶ 11 (discussing limitations of UNE-based competition).

Jackson Decl.”), ¶¶ 7-10 (Tab D hereto); see also NY Order ¶ 433. SWBT’s performance plan includes reporting requirements and standards for many of the key local service functions that are measured. However, there are a few critical areas not measured at all and not subject to standards or remedies (most notably all aspects of change management), and the remedies are far too trivial and watered down to provide the appropriate incentives to SWBT.

a. Description of the T2A Performance Plan

The performance plan SWBT relies upon in support of its application is contained in the T2A. The T2A plan, Attachment H to the Dysart Affidavit, establishes performance metrics for specified functions and divides them into three tiers: Tier I, which are described as “end user affecting” measures; Tier II, described as “competition affecting,” and Tier III, described as diagnostic.^{37/} Monetary payments are made to individual CLECs if SWBT fails to provide parity or meet a benchmark (a metric with no retail analog) for the set of metrics included in Tier I. The determination whether parity or a benchmark was not satisfied is based on a statistical methodology described in the plan and discussed below. Payments for violations of Tier II metrics (as defined by the plan) are made to the Texas State Treasury, but only if SWBT misses the standards for three consecutive months. See Dysart Aff., att. H, at p. 15. Within each tier the measures are divided into categories of high, medium, or low, purportedly based on the

^{37/} MCI WorldCom does not agree with the claimed distinction between “end user affecting” and “competition affecting” measures, and unsuccessfully resisted this artificial distinction in proceedings before the PUC. If poor performance by SWBT for a given function can adversely impact a local customer of a CLEC (*i.e.*, “end user affecting” functions such as loop installation and restoration), that function necessarily is competition-affecting. Similarly, SWBT conduct that harms CLECs ultimately harms consumers, whether directly or indirectly. Local competition will not succeed when “end users” are adversely affected by SWBT’s poor performance.

importance of each measure. See id. p.10. Each class has different payout amounts. In Tier I, the remedy payments range from a low of \$25 per month for each occurrence to a high of \$800 per month – and even this supposedly “high” payment applies only if SWBT misses the most important type of standard for six months in a row. Id.

b. The level of remedies is trivial.

(i) Inadequacy of low per-occurrence payments. The primary defect with the T2A plan is that the base remedy amounts are simply too low to give SWBT the appropriate incentive to cooperate with its competitors in the local market. The core remedy provisions of the plan, in Tier I, call for remedy amounts of only \$25, \$75, and \$150 per occurrence. The notion that these amounts would have an impact on a company the size of SBC is nothing short of comical.

Assume, for example, that after weeks of competitive bids MCI WorldCom wins the business of five key business customers. All five experience extended, unplanned service outages because SWBT botches the cutovers. SWBT applies all the statistical tests it includes in the T2A plan and confirms that it violated the cutover standard for MCI WorldCom customers that month. The impact on MCI WorldCom would likely be that some of the customers would discontinue their relationship with MCI WorldCom for local service, and others may discontinue using MCI WorldCom for long distance and other services because of the outages. Indeed, MCI WorldCom’s prospects for new customers could be significantly impaired because word would get out that customers are losing dial tone when they switch to MCI WorldCom, or MCI WorldCom will have to advise prospective customers that it cannot guarantee the customer will not lose dial tone for significant and unplanned periods. Weighed against all this harm to MCI

WorldCom, SWBT would pay Tier I remedies of a few hundred or a few thousand dollars as its market share became even more entrenched.

There is no need to speculate as to the theoretical results, however, as the PUC staff analyzed SWBT's performance, and the applicable remedy amounts, from June 1999 to August 1999. See PUC Staff Three-Month Performance Evaluation for SWBT.^{38/} The results are telling. During that period SWBT performed poorly in many critical areas, but the remedies staff calculated based on the T2A plan were trivial. For example, the Tier II assessments included:

- \$13,167 payment by SWBT for missing significantly more repair appointments for CLECs than for its own customers, three months in a row (PM 3805; DF);
- \$1,667 payment by SWBT for missing the standard for loop installation within the required time period, three months in a row (PM 5601) (for standard of 95% on time, SWBT installed only 83% of loops on time for CLECs);
- \$3,667 payment by SWBT for significantly and repeatedly discriminating against CLECs by missing due dates for loops (e.g., missing 9% of due dates for CLECs in July, 1999, and 1/2 of 1% of due dates for its own customers the same month) (PM 5804).

See SWBT App. C, Tab 1845, att. 2 (PUC staff chart titled "Trouble Spots – Tier 2 Measures That Do Not Comply With Standards for Two Out of Three Months"). Similarly, PUC staff calculated potential damage amounts for Tier I misses. The paltry amounts that were triggered, in many cases for substantially poor performance, are reported in Attachment 9 to the staff's analysis (SWBT App. C, Tab 1845).

^{38/} The staff memorandum can be found in SWBT Appendix C, Tab 1849. The appendices to the same memorandum are separately filed in SWBT Appendix C, Tab 1845.

Although staff has apparently not performed similar calculations for the past three months, SWBT recently released information on its website showing the amount of remedies it paid for both Tier I and Tier II payments in November. In that month SWBT paid a grand total of \$2,050 in Tier I remedies, and \$0 for Tier II.^{39/} SWBT paid this amount despite missing numerous performance standards, and many by a wide margin.

The Common Carrier Bureau has noted its concern with per-occurrence payments, focusing on the calculation of such payments for low-volume services.^{40/} As the examples above illustrate, per-occurrence remedies result in woefully insignificant remedies even for higher volume services and order types.

SWBT trumpets the Tier II remedy payments payable to the Texas State Treasury, but these payments are not triggered unless SWBT has discriminated against the entire CLEC community for three consecutive months. The problem is that even one month of poor performance, such as during a CLEC's ramp-up before it has established a reputation in the local market, can seriously erode prospects for local competition. And it is difficult to imagine that even SWBT believes two consecutive months of poor performance would not gravely impact any CLEC at any stage of market entry. Yet all SWBT need do is choose particular months to meet the standards in order to render the Tier II payments useless. SWBT can easily target CLECs during any given month without fear of invoking Tier II remedy payments. Indeed, the Tier II

^{39/} See <https://clec.sbc.com/clecb/restr/pm/pm.cfm>.

^{40/} See Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, to Priscilla Hill-Ardoin, Senior Vice President, SBC (Sept. 28, 1999).

scheme allows SWBT to target a particular CLEC for poor performance (such as during a key ramp up or marketing campaign), but avoid any payments by aggregating that performance with adequate performance to other CLECs. In short, the Tier II system will rarely, if ever, be triggered, leaving SWBT with only a prospect of a slap on the wrist from the clearly inadequate remedy amounts in Tier I.

(ii) **Caps on remedy amounts further weaken plan.** The SWBT plan is further weakened by the imposition of caps on the per-occurrence payments (in addition to the overall plan cap). To the extent that per-occurrence payments could ever amount to an appreciable amount (possibly by an extended shut-down of all services for all CLECs), they would be reduced by the per-measurement caps to ensure that SWBT never pays a remedy with any teeth. Recent changes to a few of the per-occurrence caps are ineffective, as SWBT will reinstate the former caps as soon as it provides three months of compliant service on the affected measures. See Dysart Aff. att. K, p.4. But if the caps were so low that SWBT was compelled to increase them in order to provide a greater incentive for cooperation with CLECs, it makes no sense to reinstate the ineffective rules simply because SWBT refrains from discriminating for three months. CLECs need assurances that the local market will be open for the long term, not just the next quarter.

(iii) **Remedies do not increase for more severe violations, and increase insignificantly for repeated violations.** In addition, the T2A plan is ineffective because it does not adequately (or in most cases, does not at all) take into account the magnitude and the duration of poor performance by SWBT. SWBT will not be encouraged to provide quality service to CLECs, let alone to improve poor performance, when it is faced with the same trivial amount for missing a

deadline by 500 hours as it is for a half-hour delay, and when it pays the same amount for providing timely order status notices 5% of the time as it does for compliance 85% of the time. Neither Tier I nor Tier II of the plan provides for increased remedies based on the severity of the violations.

Moreover, under Tier II SWBT pays the same amount of remedies each month even if it fails to correct a severe problem for months on end. Under Tier I, the remedy amounts payable to CLECs increase, but insignificantly, for repeated violations. For Tier I “medium importance” standards, the remedy amount is a paltry \$75 per occurrence for the first month, increasing to only \$400 for four consecutive months of poor performance, and only \$600 per occurrence for six months or more of repeatedly bad performance. For standards SWBT recognizes as the most significant (the “high” category), the per-occurrence payments begin at only \$150, increase to \$600 for four months of unimproved performance, and only \$800 for six months or more of repeatedly inadequate performance. Dysart Aff., att. H, p.10.

Basic common sense dictates that a plan that is supposed to discourage backsliding should require increasing amounts based on both the magnitude of the poor performance (how far off the required standard SWBT performs) and the duration of the miss (how many months SWBT’s performance remains out of compliance). SWBT’s remedy plan does not provide for greater payments for more severe misses, and only the Tier I payments (which SWBT describes as not impacting competition) increase – albeit minimally – after repeated violations.

c. Misguided statistical loopholes lessen SWBT's obligations.

The problem of the woefully insufficient remedy amounts is exacerbated by the excessive statistical loopholes in the remedy plan. For example, SWBT misuses a statistical test to artificially and irrationally lower all the benchmark standards (a standard set at an absolute level because there purportedly is no retail analogue in SWBT's service to its own customers). The effect of this mistake is that the benchmark standards, which already include "forgiveness" for SWBT by not requiring 100% adequate performance, are watered down for no reason at all. See Ford & Jackson Decl. ¶¶ 53-63 & app. B. Regulatory agencies should not be misled by this obvious flaw in the SWBT plan – a flaw that SWBT inserted to further lessen its obligations. The accompanying declaration of George Ford and John Jackson explains that this loophole has absolutely no basis in accepted statistical principles.^{41/}

Second, what SWBT calls its "k value" methodology is another statistical technique misapplied to achieve the effect of removing standards from the required list. Using the "k value exclusion," SWBT can excuse itself from violating a substantial number of standards in any given month. Dysart Aff., att. H. SWBT's justification for this practice is that it supposedly is necessary to account for random results showing false reports of disparity. But, as explained in the Ford & Jackson declaration, the T2A plan already takes into account the possibility of randomness and, indeed, is already tilted in SWBT's favor by requiring a 95% confidence level.

^{41/} MCI WorldCom encourages the Department of Justice in its evaluation, and the Commission to assess this methodology (and the entire SWBT plan) through independent experts, including statisticians, so that the Commission does not unintentionally send a message to BOCs and state commissions that clearly erroneous statistical practices and ineffective remedy plans will be overlooked in future applications.

The additional level of “k value” forgiveness is unwarranted and further dilutes an already ineffective plan.^{42/}

Third, through a different use of the “z value” than Bell Atlantic employs in its performance plan, SWBT lessens its obligations to provide nondiscriminatory service even further by giving itself a passing grade for repeatedly marginal performance. The z value is used to determine the level of confidence that disparate performance data in fact show discriminatory conduct. Greater z values mean a greater chance that reports of disparate treatment to CLECs equate to discrimination. Z values greater than 1.645 trigger remedies under both the Bell Atlantic and SWBT plans. Because it is not as likely that a z score between 0.8225 and 1.644 indicates discrimination, neither the New York nor the Texas plan requires remedy payments if the score in one particular month falls in that range. However, when there are recurring scores in that marginal range, statistically there is confidence that discrimination is occurring. Thus, for repeated scores in that range, the New York plan appropriately requires remedy payments (for scores between 0.8225 and 1.645). The Texas plan does not, even if SWBT’s performance continues at that unacceptable range for several months on end.

^{42/} That SWBT has agreed to exempt certain measurements from k value exclusion, see Dysart Aff., att. K, at 3, suggests that SWBT is well aware that the k value improperly excuses poor performance on key measures. Unfortunately, SWBT has agreed only to remove the k value exclusion for these measures until it meets the standards three months in a row, after which it will reinstate the k value loophole and regain its ability to violate excluded standards at will. The point of a performance remedy plan is to prevent backsliding on a long term basis, not to allow a BOC to discriminate as soon as it provides three months of adequate service.

d. Important functions are not subject to standards.

In addition to the problem of trivial remedy amounts for the standards covered by the plan, some vital local service functions are not covered by any standards in Texas. For these, there are no self-executing remedies regardless how badly SWBT performs or discriminates. The most significant omission in the plan is change management, an area the Commission has recognized as vital to local competition. NY Order ¶¶ 102-103, 439 & n.1341. When an ILEC fails to adhere to change management notice requirements, it prevents CLECs from developing to the systems changes, which can delay entry or stop the operation of existing OSS interfaces. For example, change management rules require sufficient notice of SWBT software upgrades and testing to ensure that the new software does not shut down CLEC systems. But without performance standards for these critical areas, SWBT can violate the change management requirements at will, leaving CLECs with only the time consuming and expensive process of filing complaints before regulatory bodies – after the violation has shut down the CLECs’ systems. An effective remedy plan would discourage SWBT from violating change management requirements in the first instance.

Notably, the Bell Atlantic performance plan includes several change management standards, including those relating to notification of system changes, software validation, resolution of problems discovered in Bell Atlantic’s systems, and change management timeliness. See generally NY Order ¶ 439 n.1341 (complimenting New York PSC and Bell Atlantic for

instituting performance standards for change management).^{43/} All of these should be added to the Texas plan.^{44/}

e. The Performance Remedy Plan Will Not Serve Its Intended Purpose to Prevent Backsliding.

The insignificant remedy amounts in SWBT's performance plan do not come close to counteracting the gain to SWBT from providing poor performance to its would-be competitors. As explained in the accompanying declaration of George Ford and John Jackson, SWBT benefits enormously from discriminating against CLECs, including (i) the benefit of retaining a customer's business, potentially for many years, when the customer loses confidence in a CLEC; (ii) the gain to SWBT from deterring further competitive entry by CLECs, including deterring CLECs from "ramping up" from low volumes used in initial entry; and (iii) SWBT's gain in market share as a source for "one stop shopping" due to customers' dissatisfaction with a competitor's service. The insignificant remedies in the performance plan, coupled with loopholes that will prevent the

^{43/} SWBT disingenuously argues that CLECs did not request change management metrics as part of the change management discussions. As SWBT well knows, however, MCI WorldCom and other CLECs raised the need for change management metrics in the 271 and performance dockets before the PUC. See, e.g., MCI WorldCom's Comments on Telcordia's Final Report, Texas PUC Docket No. 20000, at 37-39 (Oct. 13, 1999) (SWBT app. D, Tab 82). MCI WorldCom was instructed by the PUC staff to defer further advocacy of additional measures until the PUC conducts a six-month review of the measurement system later this year.

^{44/} For example, far more robust DSL metrics are needed, as all parties apparently recognize. The PUC is developing these metrics as part of an ongoing DSL arbitration proceeding. In addition, a corrective action plan that was part of an earlier remedy plan proposal was removed; a corrective action plan is a critical element – along with sufficient remedy amounts – to prevent SWBT from choosing to pay remedy amounts without repairing the underlying problem.

higher amounts from ever being triggered, do not come close to offsetting these long term gains to SWBT from providing poor service to CLEC competitors.

The solution to this problem is not to make cosmetic fixes to the remedy plan as SWBT has done recently (e.g., raising a few sub-caps and eliminating some “k” value exclusions, but only until SWBT provides three months of nondiscriminatory performance), but to do away entirely with the methodology of low per-occurrence remedies. Instead, remedy payments should be based on per-measurement amounts – or significantly greater per-occurrence amounts – that are high enough to affect SWBT’s conduct, such as per-measurement amounts of \$25,000 or more that increase based on the magnitude and duration of the poor performance. MCI WorldCom’s proposed remedy plan, which incorporates these key elements, is included as Tab I hereto.

The recent increase in the overall cap to \$289 million was a meaningless gesture, as the cap would never be approached unless SWBT shut down or disconnected every actual or potential CLEC customer. Thus, even assuming \$289 million represented an appropriate incentive despite the far greater gains to SBC from preserving its monopoly position and harming the reputation of competitors providing local, long-distance and bundled services, that cap has no relation to potential remedies, since even sustained, significant failures result in remedies of only a few thousand dollars. A cap that by definition will never be approached has no deterrent effect and is simply a distraction from the real issues. As the Commission has recognized, the question is not simply the amount of the overall cap, but whether liability “would actually accrue at meaningful and significant levels when performance standards are missed.” NY Order ¶ 437 (emphasis added). The Commission properly concluded that “an overall liability amount would be

meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure.” Id. That is precisely the case with the T2A plan.

There is no question that the PUC put a good deal of effort into improving the original plan that SWBT proposed, which was even more flawed than the T2A plan. But the Commission would be shirking its duty, and sending the wrong message to BOCs and state commissions that are currently working on remedy plans, if it were to confuse good faith efforts with results. The T2A plan must be recognized for what it is – a gentle slap on the wrist that will have no impact on a company the size of SBC with so much to gain from preserving its local monopoly and impeding competition for “one stop shopping.” The plan can be strengthened in a matter of weeks if the Commission acknowledges its obvious flaws.

f. Other Incentives Are Insufficient to Level the Playing Field.

SWBT claims that it does not matter whether its remedy plan is itself effective in deterring discrimination because SWBT has other reasons to cooperate with competitors, including the performance conditions in the Order governing SBC’s merger with Ameritech; the risk that the Commission will suspend SWBT’s long distance authority; the threat of antitrust actions; the threat of payments from interconnection agreement remedy provisions; and the incentive SBC has to provide good performance in order to gain section 271 authority in its remaining states. SWBT Brief at 45-47; NY Order ¶ 430.

The problem with all of these suggestions is that they are slow, uncertain, require extensive expenditure of resources by CLECs, and ultimately are ineffective at curbing the cumulative effect of “death by a thousand cuts” – the day-to-day discrimination that has the

cumulative impact of impeding or destroying competition. MCI WorldCom addresses the insufficiency of each of these alternatives in turn:

First, after-the-fact regulatory enforcement efforts – particularly with technical issues, complex and disputed facts, and unspecified standards – are at best a poor substitute for self-enforcing remedies based on failure to meet objective standards regardless of cause and proof. SWBT will always have the advantage of superior access to relevant information, and discovery in regulatory proceedings is limited, difficult, and time-consuming. Affected CLECs and regulators would have to spend an enormous amount of time and money to prosecute enforcement claims based on poor performance, both in regulatory proceedings and in subsequent review by the courts. A CLEC deciding whether to expend the resources to litigate an enforcement claim will have to weigh the great uncertainty in whether the desired result will be achieved. In addition, CLECs do not know how deliberate, widespread and persistent performance failures must be before a regulator would be willing to withdraw SWBT's section 271 authority or impose other severe sanctions (such as a refusal to grant additional section 271 applications even if SWBT or other SBC ILECs have otherwise satisfied the checklist in another state).

Moreover, SWBT's current desire to obtain section 271 authority in additional states does not solve the problem because this incentive will at most last until SBC obtains section 271 authority in other key states in its region. SBC has the ability to obtain section 271 authority in these states reasonably promptly (and routinely contends that it has already met all the requirements of section 271 in all of its states). Decisions by CLECs to make major investments and long-term commitments needed for a meaningful launch of local service depend on some

level of confidence that BOC performance will be acceptable over the long term, not just for a limited time until it is no longer in the BOC's interest to cooperate.

The Commission's assessment of any performance remedy plan must be based on what is needed to prevent post-entry backsliding in the long term. It would be difficult, if not impossible, for the Commission to raise or lower the bar for an effective remedy plan based on a fluid notion of just how much incentive a BOC has at any given time. The Commission should not set one standard today for SBC based on the premise that SBC will "behave" at least until it gains entry in key states such as California and Illinois, only to increase the standard needed for an effective remedy plan after SBC gains entry in California, and increase it yet again after SBC gains entry in Illinois. It would be difficult at best to calibrate such a variable remedy plan.

As a result of these factors, the theoretical prospect of additional regulatory consequences that might be imposed at some unknown (but likely distant) point in time will have little practical impact on SWBT's conduct. See Ford & Jackson Decl. ¶¶ 68-72. That is true even with this Commission's commitment to improved enforcement. These inherent problems with after-the-fact regulatory proceedings mean that efforts by even well intentioned and well funded regulators have limited practical value.

Second, antitrust remedies are even more uncertain and resource intensive and therefore cannot significantly increase the incentive for nondiscriminatory, reasonable performance to CLECs provided by self-executing performance plans with solid standards and meaningful remedies. At a minimum, antitrust action would force CLECs to engage in protracted litigation about the reasonableness of the BOC's performance (apart from any remedy plan) and the causes

of the poor performance. All of the factors that make regulatory litigation difficult, expensive and uncertain also apply to private antitrust actions. The delay and uncertainty in any final resolution of the case substantially decreases any deterrent effect.

Third, the performance conditions in the Merger Order do not make up for the deficiencies in the T2A plan. Those conditions are not even intended to serve the “anti-backsliding” purpose of a section 271 remedy plan. Indeed, the Commission emphasized in the Merger Order that it found only that the federal performance plan is sufficient to offset or prevent some of the potential harmful effects of the merger, but that the Merger Order performance plan is “not designed or intended as anti-backsliding measures for purposes of section 271.” Merger Order ¶ 380. In contrast to the performance plan incorporated in the Merger Order, “performance programs that are being developed by state commissions in the context of section 271 proceedings serve a different purpose and may be designed to cover more facets of local competition and to prevent a BOC from backsliding on section 271 obligations.” Id. ¶ 481. Moreover, the Merger Order performance plan not only suffers from the defects identified above in the T2A plan, it actually contains a smaller subset of measures than are contained in the T2A, and no payments of any kind are triggered unless SWBT misses the standards for three consecutive months. In addition, any payments due under the Merger Order are offset by payments made under state performance plans. Thus, the Merger Order plan will have no appreciable “anti-backsliding” effect.

Finally, the prospect of SWBT facing additional liability under negotiated interconnection agreements with more strict remedy provisions ignores reality. The T2A plan represents the most

the PUC was willing to impose on SWBT. It was precisely because of the inadequacies with remedy plans SWBT was willing to negotiate that CLECs complained; the Texas PUC rejected SWBT's approach and established a docket that led to the performance plan contained in the T2A. As the T2A is the most CLECs could attain for a performance remedy plan, it is no wonder that SWBT does not in its Application point to a single interconnection agreement that contains a more effective remedy plan, including remedies more severe than those in the T2A. For example, in the case of MCI WorldCom, while it was able to negotiate in its interconnection agreement a few provisions that are more effective than the T2A, the overall remedy scheme SWBT would agree to is far inferior to that in the T2A.

For example, the plan SWBT insisted on in negotiations allows SWBT to accumulate credits for "good behavior." That is, SWBT can deliberately discriminate against MCI WorldCom for key local service functions, but avoid any remedy payments by providing above-par performance for different and less important functions. This was one of the primary criticisms MCI WorldCom and other CLECs raised before the PUC, and the result was the PUC forced SWBT to abandon that methodology in the T2A. In addition, SWBT refused in negotiation to include numerous important metrics in its interconnection agreements (many additional metrics were added to the T2A at the insistence of the PUC). Thus, the T2A remedy plan, as flawed as it is, represents the most CLECs were able to obtain after vigorous advocacy before the PUC. The interconnection agreements are less effective and thus add little or no additional incentive for SWBT to provide reasonable, nondiscriminatory service to CLECs.

In sum, the T2A plan must by itself provide an adequate incentive for SWBT to provide reasonable, nondiscriminatory performance to CLECs on a day-to-day basis. Other possible remedies are too limited, too uncertain, and too costly to provide significant additional incentives. A plan that provides sufficiently severe self-executing remedies for failure to meet performance standards for all key local service functions is far and away the best means of encouraging a BOC to continue to provide interconnection and UNEs to CLECs on nondiscriminatory and reasonable terms. The gross inadequacies of the T2A plan described above are not offset by the theoretical possibility of other types of remedies.

C. Long Distance Competition Will Suffer from a Premature Grant of Section 271 Authority.

Because SWBT is not in compliance with several aspects of the competitive checklist, SWBT's entry into the already robustly competitive long distance market^{45/} would not be in the public interest. As the Commission stated in the NY Order, "Absent checklist compliance, grant of section 271 authority could potentially harm the long distance market because the BOC would have a unique ability to introduce vertical service packages" NY Order ¶ 428.

Indeed, telecommunications providers increasingly strive to offer consumers bundled services. See Beard & Mayo Decl. ¶ 14. These circumstances mean that it is more important than ever that SWBT provide non-discriminatory access to its local network before being granted long distance authority. SWBT will otherwise have available to it significant economic and technological tools to leverage its present local service monopoly into long distance. See Beard &

^{45/} See Beard & Mayo Decl., att. 3, ¶ 31 (discussing "intense rivalry" in the long distance market).

Mayo Decl. ¶ 8. This unwarranted leverage deprives customers of the benefits of competition and is directly contrary to the public interest.

SWBT could also harm competition in the intrastate toll and interstate markets by using its ability to impose access charges on its competitors that are far higher than its own costs of providing access. The significant gap between SWBT's cost of providing access and the charges it continues to impose on other interexchange carriers permits SWBT to engage in price squeezes.^{46/} Under SWBT's current access charge plans, it could offer intrastate toll and interstate services to customers at prices that fully reimburse its very minimal access costs, and at the same time preclude unaffiliated interexchange carriers from doing so because their SWBT-imposed costs of access are so much higher. SWBT's entry into in-region long distance and into bundled services will not be fully in the public interest until SWBT reduces its access charges to cost.

CONCLUSION

SWBT has not yet met the market-opening standards clearly set forth in the Commission's prior orders, and its application should therefore be denied as premature.

^{46/} In addition to the inflated interstate access charges permitted by federal regulations, Texas regulation permits some of the highest intrastate toll access charges in the country.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Mary L. Brown", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Jerome L. Epstein, hereby certify that I have this 31st day of January, 2000, caused a true copy of Comments of MCI WORLDCOM, Inc. and appendices to be served on the parties listed below:

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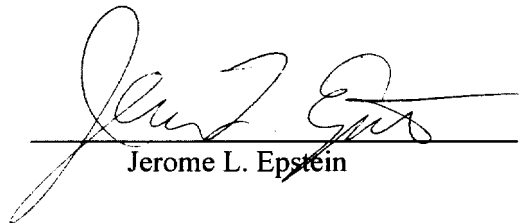
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